C

EXHIBIT C

Interoffice Transport Must be defined as a UNE

Interoffice Transport Must be defined as a UNE

As discussed in its filed comments, MGC believes that Interoffice transport must be defined as a UNE. (MGC has attached a copy of its filed comments on interoffice transport as Exhibit 1). MGC currently operates in five separate ILEC territories. To date, the only ILEC that has not consistently provided Unbundled Local Transport is Ameritech. Ameritech represents the reason why the Commission must adopt national UNE standards. Specifically, the Commission must compel all ILECs to follow the same set of rules so that CLECs may gain some certainty while trying to execute a business plan and raise financing.

MGC is providing examples of Ameritech's unwillingness to provision interoffice transport at UNE prices and sometimes at all. Specifically, Ameritech takes the position that once it is out of inter-office transport that is no longer required to provide inter-office transport at UNE rates or, unless requested at tariffed rates, build it at all. This position, if validated means that ILECs may be allowed to stop building network transport to augment their own networks so that CLECs may not be able to purchase transport to support their networks. MGC has attached several letters that detail the nature of this dispute and has provided a copy of its network as it existed in July 1998. MGC's network does not concentrate on metropolitan Chicago. Rather, it focuses on the suburban urban ring around Chicago. This means that no other provider of fiber is available to MGC in the same ubiquitous nature as Ameritech. Furthermore, in most cases, Ameritech is the only inter-office transport provider available to MGC. Therefore, Ameritech is in a unique position to dictate where CLECs may deploy their networks if they are allowed to arbitrarily decide when and ahere unbundled transport is available.

The following is a list of exhibits that illustrate Ameritech's unreasonable position regarding unbundled inter-office transport:

1. Exhibit 1 MGC's UNE Remand comments regarding Interoffice transport
2. Exhibit 2 July 15 and July 16, 1998 letters to Ameritech from MGC and a diagram of MGC's Chicago Network. These letters represent MGC's attempt to understand Ameritech's position regarding Unbundled Local Transport.
3. Exhibit 3 July 2, 1999 letter from MGC to Ameritech confirming Ameritech's position that it is not required to provide Unbundled Local Transport.
4. Exhibit 4 E-mail from Ameritech to MGC outlining Ameritech's legal basis for not providing Unbundled Local Transport.
5. Exhibit 5 June 11, 1999 letter from MGC to Ameritech requesting dispute resolution on the issue.
6. Exhibit 6 June 28, 1999 letter from Ameritech to MGC designating representatives for dispute resolution.
7. Exhibit 7 FCC 96-325 Paragraph 443 that Ameritech relies on for authority to not provide Unbundled Local Transport.

EXHIBIT C-1

Exhibit C-1

<u>**MGC's UNE Remand Comments Regarding Interoffice Transport**</u>

3. The Commission Must Continue to Require Unbundled Access to Interoffice Transport

The ubiquitous nature of ILEC transport remains critical to the development of local competition and to CLEC plans to provide ubiquitous local voice and data services to residential and small business consumers. At this early stage of local competition, a competitive wholesale market for ubiquitous transport facilities has not developed and unbundling remains an essential component of the infrastructure of local competition. In fact, ILECs generally interconnect their own networks through end-office transport. However, ILECs such as Pacific Bell, GTE, BellSouth, Ameritech, and Sprint require CLECs like MGC to provision transport from an ILEC central office to MGC's host switch. Therefore, ILECs currently require CLECs to deploy less efficient networks than ILEC networks. ILECs should be required to allow unbundled access to ILEC transport to provide CLECs with competitive parity with the ILEC networks.

a. Interoffice Transport Meets the Section 251(d)(2) Standard for Unbundling

Interoffice transport is a non-proprietary network element that qualifies for unbundling under the "impair" test of Section 251(d)(2)(B). In its *Local Competition First Report and Order,* the Commission determined that interoffice transport was not "proprietary."[1] The same conclusion is compelled under MGC's proposed definition of "proprietary," as interoffice transport unbundling does not involve the disclosure of CPNI or information and processes protected by intellectual property laws.

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1 *Local Competition First Report and Order* at ¶ 446 ("Commenters do not identify any proprietary concerns relating to the provision of interoffice facilities that LECs are required to unbundle.").

In its initial "impair" analysis, the Commission found that an interoffice transport unbundling requirement would:

- "increase the speed with which competitors enter the market;"[2]
- "decrease the cost of entry compared to the *much higher* cost that would be incurred by an entrant that had to construct all of its own facilities;"[3] and
- "improve competitors' ability to design efficient network architecture, and in particular, to combine their own switching functionality with the incumbent LEC's unbundled loops."[4]

The Commission also concluded that "[a]n efficient new entrant might be able to compete if it were required to build interoffice facilities where it would be more efficient to use the incumbent LECs' facilities." These conclusions are no less valid today. Indeed, the additional delay to market and increased cost structure that would be associated with self-provisioning or obtaining transport from another non-ILEC source (to the very limited extent that such sources exist) would far exceed that which could be considered material.

Congress clearly intended that new entrants would be able to share in the advantages that result from incumbency. Unbundled access to the ILECs' ubiquitous transport network is one of the ways this is accomplished. Additionally, this notion was reconfirmed in the Commission's 706 ruling when the Commission recognized a CLEC's right to deploy functional switching equipment in collocation cages located in ILEC central offices.

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2 *Id.* at ¶ 441

3 *Id.* at ¶ 441 (emphasis added); *see also* ¶ 447.

4 *Id.* at ¶ 447 (finding that interoffice transport meets the "impair" test, as then defined by the Commission.)

Allowing CLECs to provide their own end office switching coupled with access to ILEC interoffice transport will afford CLECs such as MGC the ability to compete for residential and small business customers in a way that makes economic sense. MGC has done a study that shows approximately 50% of all traffic generated in a particular rate center originates and terminates within a 20 mile radius. However, ILECs will not allow MGC to purchase the interoffice transport to interconnect MGC collocation cages in ILEC central offices. Instead, MGC is required to purchase transport from the ILEC back to the MGC host switch which in turn is interconnected with the ILEC access tandem. In this scenario, a call to a next door neighbor could travel more than 180 miles round trip because the ILEC refuses to allow CLECs like MGC to purchase interoffice transport between ILEC central offices.[5]

Neither self-provisioning nor other non-ILEC sources are capable of approximating the ubiquity nor the cost structure of the ILECs' interoffice facilities. In its *Local Competition First Report and Order,* the Commission recognized that "there are alternative suppliers of interoffice facilities in certain areas."[6] This remains true today. However, an efficient wholesale market for interoffice transport simply has not developed. The extent to which competitive interoffice transport facilities have been built is still relatively negligible. In most cases, alternative facilities have been built for

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5 In the example quoted, MGC has a host switch in Pomona, California, that is interconnected to MGC collocation equipment in Agora, California and Woodland Hills, California. Rather than allowing MGC to pass a call from Agora to Woodland Hills, which are located about ten miles apart, Pacific Bell requires MGC to pass the traffic back to its Pomona switch and route the call through Pomona rather than through a more direct route. The net result is that MGC incurs a much higher costs by complying with calls through inefficient ILEC-dictated network design rather than delivering a local call through its natural path.

6 *Id.* at ¶ 441.

self-provisioning purposes and they have not produced excess capacity that has resulted in the development of a fluid wholesale market for such services. Indeed, in the vast majority of cases, ILEC unbundled transport is the **only** available option for meeting competitors' interoffice transport needs.

Although, a competitive wholesale market for *some* interoffice transport facilities is likely to develop, particularly in more densely populated tier one markets, this has not occurred for any type of interoffice transport in the outlying areas of major metropolitan areas, nor in rural areas. Even a limited wholesale market may still take years to develop in those areas of the country where competition is most advanced.

As the Commission recognized in its *Local Competition First Report and Order,* a transport unbundling requirement encourages the development of an efficient network architecture and promotes the ability of new entrants to combine their own facilities with those of the ILECs. Nowhere is this more essential than in markets where a wholesale market shows signs of developing.

b. The Commission Should Affirm that Its Existing Interoffice Transport Definition Requires ILECs to Provide Unbundled Access to "Entrance Facilities" and High Capacity Transport

In its *Local Competition First Report and Order,* the Commission concluded that:

> [I]ncumbent LECs must provide unbundled access to dedicated transmission facilities between LEC central offices or between those offices and those of competing carriers. This includes, at a minimum, interoffice facilities between end offices and serving wire centers (SWCs), SWCs and IXC POPs, tandem switches and SWCs, end offices or tandems of the incumbent LEC, and the wire centers of incumbent LECs and requesting carriers.[7]

[7] *Local Competition First Report and Order* at ¶ 440.

MGC supports this conclusion and requests that the Commission explicitly reaffirm its findings in its Order on Remand. This conclusion will guarantee that facilities based competition will reach the residential and small business consumers because the essential building blocks to foster true competition will be made generally available. Consistent with the language above and in order to facilitate connectivity between ILEC and CLEC networks and elements, the Commission must clarify that unbundled interoffice transport must be made available between ILEC offices *and* between an ILEC office and a CLEC point of presence. As mentioned above, this interpretation is consistent with the 706 ruling in that it supports a CLEC's ability to provide switched calls from a collocation cage in an ILEC central office. This clarification is necessary to prevent litigation and delay, and to curb the practice of BellSouth and others who attempt to charge non-TELRIC-based rates for "entrance facilities" between their own offices and a CLEC's point of presence.

MGC also requests that the Commission explicitly affirm another of its *Local Competition First Report and Order* conclusions with respect to unbundled transport. There, the Commission found that ILECs must provide unbundled access to "all technically feasible transmission capabilities, such as DS1, DS3, and Optical Carrier services."[8] An explicit affirmation of this conclusion is necessary because, despite this language, most ILECs have resisted giving CLECs access to high speed transport. Some, ILECs, including BellSouth, have begun offering some high speed transport services. Thus, the ILECs cannot argue that such access is not technically feasible. In addition, they cannot argue that such access is not required under the Section 251(d)(2) standard.

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8 *Id.*

High speed transport is non-proprietary in nature and clearly qualifies for unbundling under the impairment test, as requesting carriers' ability to compete will be materially diminished without it. Moreover, high speed transport is essential to bringing broadband innovations to the marketplace. Thus, unbundling is not only consistent with the impairment standard, but also with the public interest and the advanced services mandate by Section 706.

c. The Commission Should Modify its Definition of Unbundled Interoffice Transport to Include Dark Fiber Transport

The Commission must allow dark fiber transport to be deemed a UNE. Again, ILECs have deployed dark fiber to account for growth in their local exchange markets. MGC and other CLECs will provide their own termination equipment, but must be afforded the opportunity to take advantage of the heavily subsidized ILEC network to provide ubiquitous service. MGC acknowledges that the Commission concluded that it did not have sufficient information to include dark fiber transport on its national list in 1996. However, based on state commission's best practices; it is appropriate for the Commission to reassess its decision.

As an initial matter, it is important to note that dark fiber qualifies as a "network element" under the definition supplied by Congress in Section 3(29).[9] There is no requirement that network elements be "telecommunications services," rather the definition indicates only that the equipment be of the type that is "used in the provision of a telecommunications service."[10] Unlit or dark fiber is clearly the type of equipment that

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9 47 U.S.C. § 153(29).

10 *Id.*

can be used in provisioning a telecommunications service. Otherwise, ILECs would not own it and CLECs would not want unbundled access to it. As a "network element," dark fiber is subject to unbundling under Section 251(c)(3), provided the Section 251(d)(2) standard is met.

Under Section 251(d)(2), the "impair" test applies, as "dark fiber" does not qualify as a proprietary network element. For the same reasons described with respect to "lit" interoffice transport above, requesting carriers' ability to compete has been and will continue to be materially diminished if unbundling is not required. Further, there are no legal or policy reasons that justify segregating these transport facilities from others in the ILECs' ubiquitous transport network. Indeed, the public interest would be served well by providing ILECs a return on this idle plant.

EXHIBIT C-2

386 6561 413

IA 28.5

MGC

Direct Dial

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EXHIBIT C-2

July 16, 1998

Richard Loechl
Account Manager
Ameritech Information Industry Services
350 North Orleans
Floor 3
Chicago, Illinois 60654

Re: Unbundled Access

Dear Rick:

Attached is the letter you requested. As you know MGC is striving to turn up service in the Chicago area within the next 30 days. The attached letter is written with reference to section 9.5.1 per your request so as not to delay our service launch. However, MGC does not agree with Ameritech's interpretation that section 9.5.1 of the interconnection agreement applies to unbundled local transport ("ULT").

Pursuant to section 9.0, ULT is an unbundled network element ("UNE") currently available and expressly contemplated by our interconnection agreement. Therefore, a Bona Fide Request ("BFR") pursuant to 9.5.1 is not necessary.

As a result of this disagreement regarding the interpretation of our interconnection agreement, this letter is notification that MGC seeks to resolve this dispute pursuant to section 27.18 which provides for dispute escalation and resolution. Please advise us of the name of the representative whom Ameritech will designate to negotiate a resolution. MGC's representative will be Kent Heyman.

Sincerely,

Richard E. Heatter

Cc: Kent Heyman
Jim Hurley
Jill Giroux

3301 N. Buffalo Drive Las Vegas, Nevada 89129 Facsimile Number (702) 310-5689

MGC

MGC Communications, Inc.

July 15, 1998

Mr. Richard Loechl
Account Manager
Ameritech Information Industry Services
350 North Orleans
Floor 3
Chicago, Illinois 60654

Dear Rick:

Pursuant to Ameritech's request as related by you during our conversation of June 24, MGC Communications requests, under Section 9.5.1 of the Interconnection Agreement, the purchase of unbundled network elements for unbundled local transport. Based upon MGC's network architecture within MSA1, it will require unbundled local transport (ULT) in the form of DS-1 and DS-3 digital facilities and cross-connects on these ULTs (see attached network diagram). In an effort to avoid any potential delays in making the MGC network operational, MGC also requests the purchase of any other unbundled network elements offered by Ameritech, not specifically identified in the preceding statement.

Regarding specifics as to quantities of each type of ULT as well as specific network requirements, please continue to work with Andy Ceccarelli, MGC's Director of Network Development. Andy can be reached at 909-455-1508.

Thank you, Rick, for your help on this matter.

Sincerely,

Jill M. Giroux

Jill M. Giroux
Director of Strategic Relations

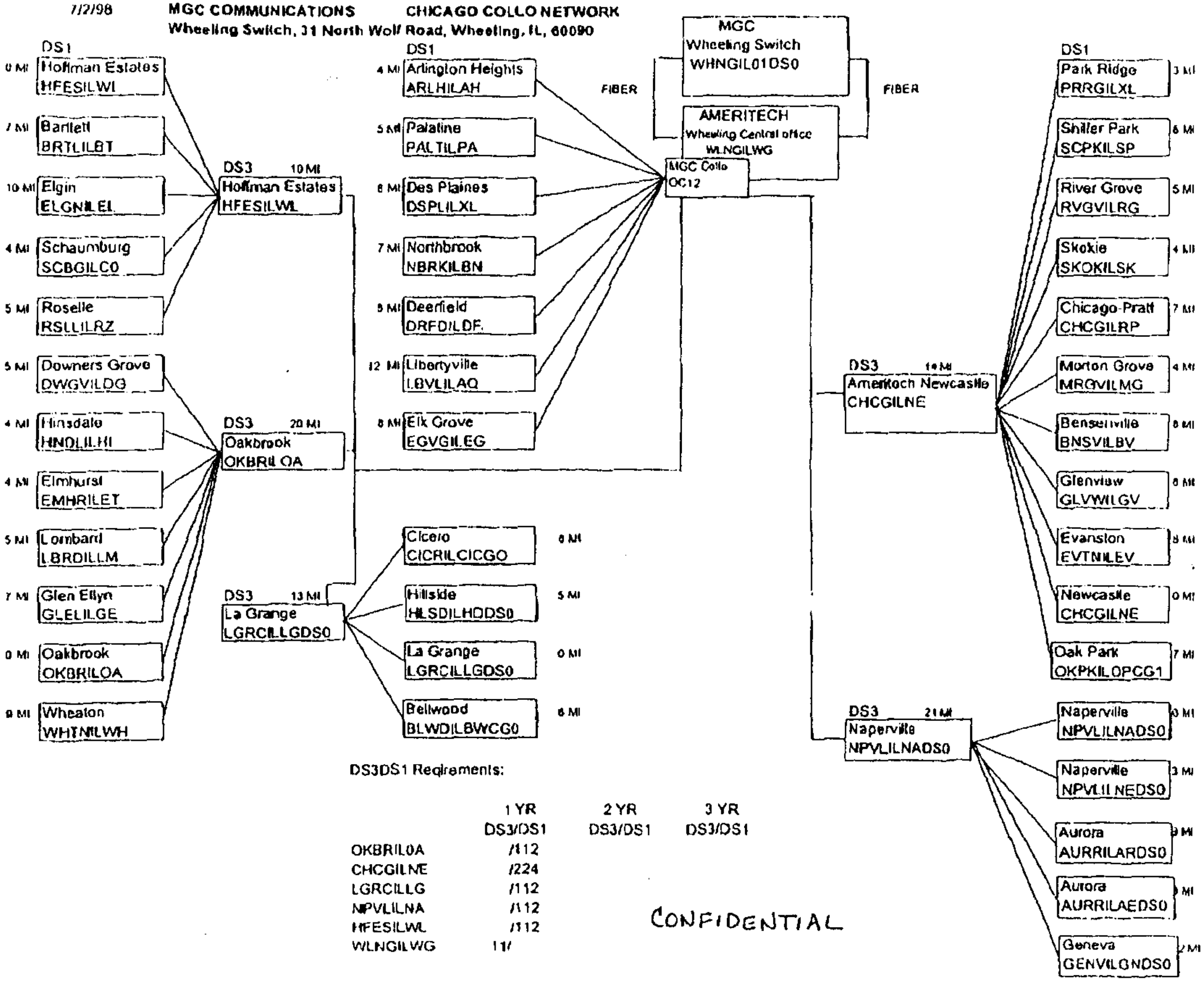
Enclosure: MSA1 Network Diagram (Confidential)

Cc: A. Ceccarelli

1460 Renaissance Dr. Suite 410 • Park Ridge, IL 60068 • Telephone (847) 768-9541 • FAX (847) 768-9548
website: www.mgccom.com

7/2/98 **MGC COMMUNICATIONS** **CHICAGO COLLO NETWORK**

Wheeling Switch, 31 North Wolf Road, Wheeling, IL, 60090



DS3DS1 Reqirements:

	1 YR DS3/DS1	2 YR DS3/DS1	3 YR DS3/DS1
OKBRIL0A	/112		
CHCGILNE	/224		
LGRCILLG	/112		
NPVLILNA	/112		
HFESILWL	/112		
WLNGILWG	11/		

CONFIDENTIAL

EXHIBIT C-3

EXHIBIT C-3

June 2, 1999

Mr. Rick Loechl
Account Manager
Ameritech
350 North Orleans, Floor 3
Chicago, Illinois 60654

Dear Rick,

I am in receipt of your e-mail to Andrew Levy, dated May 18, 1999, concerning lack of UNE transport in Newcastle. As you know, MGC Communications, Inc. (herein "MGC") ordered several T-1s from Newcastle to MGC subtending offices on March 19 and April 9, 1999. (An e-mail from Robert Sjoholm to you, dated May 10, 1999, recapping these orders, is attached.)

Your response indicates that "local UNE transport facilities have been exhausted out of Newcastle." You claim that all facilities (UNE and Tariffed) are exhausted in Newcastle, and that Ameritech is not obligated to build new UNE Interoffice Facilities. Therefore, you note, no relief is in site. You recommend MGC re-order the desired facilities as tariffed under the Special Access Tariff. You indicate that Ameritech will build new tariffed transport as per a customer order.

This letter is to advise you that MGC is re-ordering the aforementioned transport (and any additional transport for the foreseeable future in and out of Newcastle) under the Special Access Tariff. However, MGC is doing so under protest.

MGC disagrees with Ameritech's assessment that it is not required to build additional UNE transport. This policy puts MGC's ability to build and service its network at risk. MGC does not see anything in the Telephone Act of 1996, or any subsequent state or federal rules, that allows Ameritech to determine which existing or new Interoffice Facilities will be available as UNEs or as tariffed transport. MGC believes Ameritech must make any and all Interoffice Facilities available to MGC as UNE transport. Likewise, MGC is not aware of any law or agency rule or regulation that allows an ILEC to determine that it will not build additional UNE Interoffice Facilities when the transport the ILEC has unilaterally set aside as UNE transport is exhausted.

Please provide Ameritech's rationale for its position, citing state or federal law as appropriate. Time is of the essence in obtaining a response to this request as MGC is being materially harmed by Ameritech's failure to make additional UNE Interoffice Transport available. MGC reserves its rights to take any and all appropriate action to contest this unilateral policy of Ameritech.

Sincerely,

David A. Rahm, Esq.
Vice President of Network Development

cc:	Maury Gallagher	Nield Montgomery
	Rick Heatter, Esq.	James Hurley

Mike Burke
Andrew Levy

Andy Ceccarelli

EXHIBIT C-4

EXHIBIT C-A

June 4, 1999

David A Rahm
Vice President of Network Development
MGC Communications Inc.
3301 N. Buffalo Drive
Las Vegas, NV 89129

Dear Dave:

I am writing in response to your letter of June 2, 1999 asserting your disagreement with Ameritech's position that we are not obliged to construct new interoffice facilities for Unbundled Local Transport circuits. You state that Ameritech's policy "puts MGC's ability to build and service its network at risk" and offer your understanding that Ameritech unilaterally sets aside facilities and transport for ULT.

Dave, allow me to clarify that Ameritech does not set aside Interoffice Facilities and transport specifically for ULT. ULT circuits use the same, common Interoffice Facilities as are used for Special Access and Exchange Dedicated Channel services. However, when such common Interoffice Facilities are exhausted or don't exist, Ameritech is not obliged to construct new Interoffice Facilities to service an MGC order for ULT. Please refer to the FCC's First Report and Order, adopted 8/1/96, 96-325, paragraph 443:

11 FCCR 15499
11 FCC Rcd. 15499
¶451

" First, we conclude that an incumbent LEC must provide unbundled access to interoffice facilities between its end offices, and between any of its switching offices and a new entrant's switching office, where such interoffice facilities exist".

Ameritech may elect to construct new Interoffice Facilities upon receipt of a customer's order for Special Access and/or Exchange Dedicated Channel services. Any spare capacity created from the construction of new Interoffice Facilities to service Special Access or Dedicated Channel orders will be made available for assignment to additional, new orders for ULT, Special Access or Dedicated Channels equally on a non-reserved, first come- first served basis.

Dave, as Special Access service is always available to MGC for transport between its collocation sites, I do not understand your contention that MGC is being materially harmed or its ability to build and service its network is placed at risk by Ameritech's position. As always, I available to you to discuss this matter further.

Rick Loechl
Account Manager

EXHIBIT C-5

EXHIBIT C-5

VIA FACSIMILE 312-335-2927

June 11, 1999

Vice President – Network Providers
Ameritech Information Industry Services
350 North Orleans, Floor 3
Chicago, Illinois 60654

Re: Notice of Written Request To Appoint Designated Representative under §27.18 of the Interconnection Agreement Between Ameritech Information Industry Services ("Ameritech") and MGC Communications, Inc. ("MGC") regarding "Unbundled Local Transport" Dispute

Dear Vice President - Network Providers:

Please be advised that MGC requests that Ameritech appoint a designated representative with authority to settle the dispute regarding unbundled local transport ("ULT"). By way of background, this dispute began in or about March and April 1999 when MGC ordered several T-1s from Newcastle to MGC's subtending offices. MGC was advised by Ameritech that ULT facilities have been exhausted. At the same time, Richard Loechl, Ameritech Account Manager assigned to MGC, advised MGC (and confirmed by letter dated June 4, 1999) that "Special Access service is always available to MGC for transport between its collocation sites."

As Mr. Loechl admits "ULT circuits use the same, common Interoffice Facilities as are used for Special Access." Nevertheless, if Mr. Loechl is correct, Ameritech will only make those circuits available if it can collect for service at its access tariff rate. This is absurd. To the extent Special Access service is "always" available to MGC for transport as Ameritech claims, those facilities <u>must</u> be made available as ULT. For Ameritech to arbitrarily decide (as Mr. Loechl suggests) that such transport is presently available for Special Access service only is the ultimate in arrogance and is clearly discriminatory and violates the Telecommunications Act of 1996.

In order to resolve this dispute short of litigation and pursuant to the terms of the interconnection agreement between our companies, MGC expressly invokes the requirements of § 27.18, the Dispute Escalation and Resolution section of the Interconnection Agreement between the parties.

EXHIBIT C-6

Ameritech®

Information Industry Services
[illegible] Orleans
[illegible]
Chicago, IL 60654
Office 312.335.6641
Fax 312.[illegible]27

Richard Loechl
Account Manager

EXHIBIT C-6

June 28, 1999

Richard E. Heatter
Assistant Vice President Legal
MGC Communications, Inc.
3301 N. Buffalo Drive
Las Vegas, Nevada 89129

Re: Notice of Written Request to Appoint a Designated Representative for Dispute Resolution

Dear Mr. Heatter:

I am writing in reply to your letter dated June 14, 1999 in which MGC Communications, Inc. ("MGC") invokes Section 27.18 of the 251/252 Interconnection Agreement to resolve a dispute regarding "Unbundled Local Transport". The designated representatives of Ameritech to resolve the dispute are Ted Edwards, Vice President Sales and Susan Lord, Legal Counsel. Ameritech's designated representatives are prepared to meet and discuss this dispute with MGC as soon as possible.

Please contact Ted Edwards at (312) 335-6531, or me at (312) 335-6641 to schedule a date, time and location for the Dispute Escalation and Resolution Meeting.

Sincerely,

Richard Loechl

Richard Loechl

cc: Ted Edwards
Susan Lord
Eric Larsen
Mike Karson
Jerry Hampton

EXHIBIT C-7

maximize a competitor's flexibility to use new technologies in combination with existing LEC facilities.

442. We find that it is technically feasible for incumbent LECs to unbundle the foregoing interoffice facilities as individual network elements. The interconnection and unbundling arrangements among the larger LECs, IXCs, and CAPs that resulted from our *Expanded Interconnection* rules confirm the technical feasibility of unbundling interoffice facilities used by incumbent LECs to provide special access and switched transport.[988] As AT&T and Telecommunications Resellers Association point out, IXCs currently interconnect with incumbent LECs' transport facilities pursuant to standard specifications.[989] We also note that commenters do not identify technical feasibility problems with unbundling interoffice facilities.

443. We also find that it is technically feasible for incumbent LECs to unbundle certain interoffice facilities not addressed in our *Expanded Interconnection* proceeding. First, we conclude that an incumbent LEC must provide unbundled access to interoffice facilities between its end offices, and between any of its switching offices and a new entrant's switching office, where such interoffice facilities exist. This allows a new entrant to purchase unbundled facilities between two end offices of the incumbent LEC, or between the new entrant's switching office and the incumbent LEC's switching office. Although our *Expanded Interconnection* rules did not specifically require incumbent LECs to unbundle these facilities, commenters do not identify any potential technical problem with such unbundling. Moreover, some LECs already offer unbundled dedicated interoffice facilities, for example, between their end offices and SWCs for exchange access.

444. In addition, as a condition of offering unbundled interoffice facilities, we require incumbent LECs to provide requesting carriers with access to digital cross-connect system (DCS) functionality. A DCS aggregates and disaggregates high-speed traffic carried between IXCs' POPs and incumbent LECs' switching offices, thereby facilitating the use of cost-efficient, high-speed interoffice facilities. AT&T notes that the BOCs, GTE, and other large LECs currently make DCS capabilities available for the termination of interexchange traffic.[990] We find that the use of DCS functionality could facilitate competitors' deployment of high-speed interoffice facilities between their own networks and LECs' switching offices. Therefore, we require incumbent LECs to offer DCS capabilities in the same manner that they offer such capabilities to IXCs that purchase transport services.

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[988] *See, e.g.*, MCI comments at 32; NCTA comments at 42; GST comments at 24; TIA comments at 13; MFS comments at 47-48.

[989] AT&T comments at 22; Telecommunications Resellers Ass'n comments at 35.

[990] Letter from Bruce Cox, Government Affairs Director, AT&T, to William F. Caton, Acting Secretary, FCC, July 18, 1996.

D

EXHIBIT D

Dark Fiber

The Commission must allow dark fiber transport to be deemed a UNE. Again, ILECs have deployed dark fiber to account for growth in their local exchange markets. MGC and other CLECs will provide their own termination equipment, but must be afforded the opportunity to take advantage of the heavily subsidized ILEC network to provide ubiquitous service. MGC acknowledges that the Commission concluded that it did not have sufficient information to include dark fiber transport on its national list in 1996. However, based on state commission's best practices; it is appropriate for the Commission to reassess its decision.

As an initial matter, it is important to note that dark fiber qualifies as a "network element" under the definition supplied by Congress in Section 3(29).[1] There is no requirement that network elements be "telecommunications services," rather the definition indicates only that the equipment be of the type that is "used in the provision of a telecommunications service."[2] Unlit or dark fiber is clearly the type of equipment that can be used in provisioning a telecommunications service. Otherwise, ILECs would not own it and CLECs would not want unbundled access to it. As a "network element," dark fiber is subject to unbundling under Section 251(c)(3), provided the Section 251(d)(2) standard is met.

Under Section 251(d)(2), the "impair" test applies, as "dark fiber" does not qualify as a proprietary network element. For the same reasons described with respect to "lit" interoffice transport above, requesting carriers' ability to compete has been and will continue to be materially diminished if unbundling is not required. Further, there are no

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1 47 U.S.C. § 153(29).

2 *Id.*

legal or policy reasons that justify segregating these transport facilities from others in the ILECs' ubiquitous transport network. Indeed, the public interest would be served well by providing ILECs a return on this idle plant.

Sprint is providing "dim fiber" to a few insistent customers. Dim fiber is an arrangement in which Sprint provides the fiber and lights (multiplexes) the C.O. end and the customer lights the other end. I'm not sure about the cost structure for this.

Also, NextLink in addition to the deployment of their own fiber network, has an arrangement with Cox Cable to lease dark fiber.(US Cable, which was purchased by NextLink had an existing arrangement with Prime Cable).

Deterrents to fiber placement by MGC include the following:

- Fiber utilization requires multiplexers on both ends of the fiber and a distibution network to end-users. Therefore fiber applications must be to serve large customers or concentrated customers such as office complexes. MGC's targeted customer base is normally of insufficient size and concentration to recover costs of this magnitude.
- Fiber deployment requires city, state and/or county licenses, right-of-way acquisitions, easement acquisitions, construction permits and conduit and sub-duct construction in addition to the puchase and installation of the fiber. Conduit construction generally requires street excavation, trenching and resurfacing and traffic control during the construction. Considering MGC's market which includes small to medium size businesses and residential customers, rarely could we recover the costs to deploy fiber to serve a particular customer application in our target market.